92-673

No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Respondent,

v.

RODNEY BUTLER,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should this Court resolve a conflict among the Circuits as to whether mere conformity to a "drug courier profile" alone, without additional evidence of illegal activity, is sufficient to provide probable cause for arrest?

LIST OF THE PARTIES

The parties to this proceeding are Rodney Butler and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Butler hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in the unpublished memorandum opinion of *United States of America v. Rodney Butler*, dated February 18, 1992.

OPINIONS BELOW

The unpublished Ninth Circuit opinion is reproduced as Appendix A. The Order of the United States District Court for the Central District of California is reproduced as Appendix B. The Judgment and Probation/Commitment Order of the United States District Court for the Central District of California is reproduced as Exhibit C. The Order of the Ninth Circuit denying Petitioner Rodney Butler's Petition for Rehearing is reproduced as Appendix D.

JURISDICTION

The Ninth Circuit entered its opinion on February 18, 1992. A timely Petition for Rehearing with suggestion for Rehearing En Banc filed by Rodney Butler ("Petitioner") was denied on June 8, 1992. This Court has jurisdiction to review the Ninth Circuit's opinion and judgment under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, upon problable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

A. Introduction

In this case, the Ninth Circuit upheld the order of the District Court, Central District of California, denying Petitioner's motion to suppress evidence. The Ninth Circuit agreed with the District Court that police officers had probable cause to arrest Butler. The Ninth Circuit found that the clothing, jewelry, beepers and nervous mannerisms of Butler and his companions, along with the fact that they paid cash for their one-way tickets, provided the officers with the justification for approaching and talking to Butler and his companions. The suspects' reaction to their encounter with the officers—intense nervousness, lying, fleeing and the display of a large amount of cash—was sufficient to give the officers probable cause to arrest Butler and the others.

As we show below, the Ninth Circuit stands alone in finding that the behavioral characteristics present in Butler's case by themselves, without any direct evidence of wrongdoing such as an informant's tip or bulkiness indicating the presence of narcotics, provide probable cause for arrest. The Ninth Circuit decision goes far beyond the previously accepted rationale of this Court and every other Circuit in finding an exception to the arrest warrant requirement.

B. Facts

On November 3, 1990 at approximately 7:30 p.m., Petitioner Butler arrived by car at the Los Angeles International Airport with his co-defendants, Tina Ruffin and Reggie Toler. The three had come to the airport to catch an 8:00 p.m. American Airlines flight to San Jose, California. ER 40.[1]

Because the three were black (RT 55-56), because they appeared "to be extremely nervous" (ER 43), and because the two men were wearing "blue clothing, blue baseball caps, large amounts of gold jewelry and digital pagers, consistent with being 'crips' gang members involved in the transportation and distribution of narcotics" (ER 40), they caught the attention of three police officers assigned to the Los Angeles International Airport narcotics Task Force: Deputies Daniel Beers and Julio Salcido of the Los Angeles County Sheriff's Department and Detective Sig Schian of the Los Angeles Police Department. That evening, the three officers "were monitoring outbound passengers in the American Airlines terminal at Los Angeles International Airport for passengers fitting the 'narcotics courier profile.'" (ER 43).

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[1] ER citations are to the pages of Petitioner's excerpt of record filed with the Ninth Circuit in connection with Petitioner's appeal. RT citations are to the pages of the reporter's transcript of the proceedings before the Honorable Edward Rafeedie of the United States District Court, March 12, 1990.

What the officers interpreted as a "large amount of gold jewelry" was "a gold watch, a gold ring, and a gold necklace" on Butler (RT 80), along with a "gold watch and a gold chain" on Toler. RT 82. In fact, Special Agent Michael Moren of the Drug Enforcement Administration later interviewed Butler face to face inside the airport terminal for several minutes and did not notice whether Butler was wearing any jewelry at all or whether he was wearing a digital pager visible to observers. RT 66.

At the suppression hearing before Judge Rafeedie, the government produced no evidence whatsoever that either Butler, Toler, or Ruffin were associated with any gangs, including Crips.

After leaving the car, Butler and his two companions entered the American Airlines terminal. While Ruffin ran to the ticket counter, Butler and Toler walked into the men's restroom near the counter. ER 40-41. Butler "was carrying a black nylon duffle bag" and Toler was holding two plastic bags. ER 40.

Upon leaving the men's restroom, Butler and Toler walked toward the American Airlines gates. ER 41. According to Detective Schian, as the two men walked toward the gates, they "continuously scanned the other passengers and nervously looked around as if to see if someone was watching them." ER 41. Butler and Toler took a direct path to Gate 42B from which their San Jose flight was departing and sat down. ER 41.

Meanwhile, back at the ticket counter, Ruffin was waiting in line to purchase the three of them one-way passage to San Jose. Apparently impatient at the wait which turned out to be approximately twenty minutes, Ruffin stepped out of line at one point to consult with an American Airlines ticket agent about some alternative method of buying the tickets. ET 43-44.

After sitting for some time near Gate 42B, Toler walked back to the area of the ticket counter and yelled

to Ruffin, "what's taking so long?" ER 44. Toler then joined Ruffin in line. Finally, they advanced through the line to an agent. ER 47. Ruffin purchased the three tickets with cash. ER 47. Two of the tickets were issued in the name "Mr. R. Butler," and one was in the name "Ms. T. Butler." ER 48.

Ruffin and Toler walked back to Gate 42B. As they passed Butler on their way to the door of the gate, Toler nodded to Butler and stated "let's go." ER 48. The time was 7:58 or 7:59 p.m. and the three were going to be the last people to board the airplane. RT 30-32.

Standing up, Butler grabbed both the duffle bag he had carried from the car to the gate and the two plastic bags which Toler had been carrying. ER 48. Special Agent Moren then approached Butler (ER 48), while the other officers prevented Toler and Ruffin from boarding the plane. ER. 44. Identifying himself as a police officer and telling Butler that he "was free to leave at any time," Moren asked if the black nylon duffle bag was his. ER 48. After Butler responded that it was, the agent told him to sit down. ER 48.

Although Butler had already admitted that the nylon duffle bag was his, Moren continued to question him about the ownership of the bag: "I then asked Mr. Butler if both the black nylon bag and the two shopping bags were his." ER 48. To this question, Butler did not reply. ER 48. Moren proceeded to ask Butler "if he was carrying any narcotics or large sums of money." ER 48. Once again, the appellant did not respond. At this point in time, Butler had not yet been read his *Miranda* rights.

While Moren interrogated Butler, Salcido and Schian questioned Ruffin. Prior to starting the interview, Schian advised her that "she was not under arrest and was free to leave." ER 41. Upon so advising her, Schian "noted that she had a scared look on her face and that she became very nervous." ER 41-42. From the record, it is unclear

how she became "very nervous" when all the officers had already observed her as being "extremely nervous."

Schian pointed toward Toler and Butler and asked Ruffin if she knew either of them. ER 42. Ruffin "replied that she was not with them." ER 42. After Schian asked her for her ticket, she handed him all three tickets. The detective reviewed the tickets and asked Ruffin if the other two tickets were for Butler and Toler. Responding in the affirmative, Ruffin explained that she knew Butler and Toler from Monterey, California. When Schian then asked her why all three tickets were in the name "Butler," she stated that "'the guy' told her to do it like that." ER 42. During this time Ruffin "was acting very nervous and had difficulty speaking." ER 42.

The detective explained to Ruffin that the officers' job "was to monitor passengers and investigate trafficking of narcotics and large amounts of money via the airlines" and Ruffin responded "that she had no narcotics, but had money." ER 42. Ruffin then purportedly "pulled a large sum of cash from her jacket pocket and displayed the money to Deputy Salcido and myself." ER 42. The officers did not seize or count the money until later. ER 42.

As Salcido and Schian were stopping Ruffin, Toler had turned around and started to walk away from Gate 42B. ER 44. Beers then approached Toler, identifying himself as a police officer. Spontaneously, Toler exclaimed that he was not with Butler or Ruffin. ER 44-45. Beers asked Toler if he was flying to San Jose. When Toler told the deputy "that he was not flying anywhere," Beers had his suspect take a seat. ER 45.

With his detainee now seated, Beers asked him "if the black nylon bag or the plastic bags with Mr. Butler were his." ER 45. Toler replied that "he did not know anything about any bags." ER 45.

Soon thereafter, Special Agent Moren ordered Butler to move to a seat next to Toler. ER 45. Butler, who had

continued to hold the three bags while Moren interrogated him, moved himself and the bags to the other seat. ER 45.

Deputy Beers proceeded to pick up the duffle bag and show it to Butler and Toler, and then asked if it belonged to either of them. ER 45. While Butler remained silent, Toler responded "no." ER 45. Beers asked both of them again whether any of the bags belonged to them. This time, both of them said "no." ER 45. The deputy then stated "that the bags must be abandoned." ER 45.[2] Neither Butler nor Toler responded to this comment. ER 45. Immediately thereafter, Beers opened the black duffle bag. ER 45. Inside the bag, he found two kilogram-sized packages wrapped in tape. ER 45. Butler, Toler, and Ruffin "were then placed under arrest for transportation of cocaine." ER 45.

C. Procedural History

In an Indictment filed in the Central District of California, Petitioner Butler was charged with violating (1) 21 U.S.C. § 846 (conspiracy to distribute cocaine) and (2) 21 U.S.C. § 841(a)(1) (possession of cocaine with intent to distribute). ER 8-11. At his arraignment, Butler pleaded not guilty to both charges. ER 3. Before trial, petitioner moved to suppress evidence pursuant to Rule 12 of the Federal Rules of Criminal Procedure. ER 12-18. Following an evidentiary hearing, the court denied Butler's motion. ER 66. In its Order, the District Court found that the following factors constituted probable cause to arrest the petitioners:

1. The defendants wore beepers;
2. they arrived shortly before their flight was to leave;
3. Ruffin paid for the tickets in cash, using aliases for herself and Toler;
4. Ruffin and Butler gave inconsistent answers;

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[2] Both the District Court and the Ninth Circuit ruled that the bags had not in fact been abandoned. Pet. App. 2a and 7a.

5. Ruffin displayed a large sum of cash;

6. the defendants appeared nervous, even petrified.

Pet. App. 10a-11a.

Petitioner filed a timely notice of appeal. The Ninth Circuit affirmed. According to the Ninth Circuit, the defendants' clothing, jewelry, beepers, and nervous mannerisms, as well as the fact that they paid cash, and their reactions to their encounter with the officers (nervous, lying, fleeing and display of cash) were sufficient to provide probable cause for arrest. Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT ON THE ONE HAND AND OTHER COURTS OF APPEALS ON THE OTHER AS TO WHETHER MERE CONFORMITY TO A "DRUG COURIER PROFILE" ALONE, WITHOUT ADDITIONAL EVIDENCE OF ILLEGAL ACTIVITY, IS SUFFICIENT TO PROVIDE PROBABLE CAUSE FOR ARREST.

Although numerous courts have found the type of facts present here sufficient to support a temporary detention, *see United States v. Malone*, 86 F.2d 1162, 1164-65 (9th Cir. 1989), neither the Ninth Circuit in its opinion, the District Court in its written findings, nor the government in its responsive brief to the Ninth Circuit has cited a case which holds that an arrest can be justified on facts similar to the facts in this case, absent additional evidence. Counsel for the Petitioner has also sought to find such a case—and has uncovered none. Without *any* case precedent, the Ninth Circuit has justified an arrest on factors which courts in other Circuits have previously found to validate only a temporary detention.

All the cases which the Ninth Circuit, the District Court and the government have cited—and all of the cases researched by Petitioner—have one factual feature which distinguishes them from the present one: *before* arresting the defendants in these other cases, the inves-

tigating officers had either seized or at least observed actual contraband, had physical evidence that such contraband was present, or had prior information that drug-trafficking activity was ongoing, or a combination of the above. Indeed, in some Circuits, even physical evidence that contraband might be present was not sufficient for probable cause.

In the one case which the Ninth Circuit cites in support of its unprecedented holding, *United States v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 80, 112 L.Ed.2d 52 (1990), prior to arresting the defendant, the investigating officers had actually seized a large quantity of drugs from an associate of Hoyos. Furthermore, the officers had received previous information that one or more of those associates was involved in a major drug ring, had observed Hoyos acting suspiciously for several *days*, not just several *minutes*, and had to chase down Hoyos after he initially fled from arrest.

In all of the cases which the District Court cites in its Order, the appellate courts found probable cause to arrest not just on the observed behavior of individual suspects or their responses to an initial encounter with police, but on some indicia that those suspects were then carrying narcotics or were then involved in a specific drug-trafficking enterprise in which an actual seizure of narcotics or prior information had proven to exist. In *United States v. Jaramillo*, 891 F.2d 620 (7th Cir. 1989), *cert. denied*, 494 U.S. 1069, 110 S.Ct. 1791, 108 L.Ed.2d 792 (1990), for example, police officers observed the defendants' behavior to be in conformity with the typical conduct of a drug courier. According to the court, this conduct was "comparable to [that] found in similar cases where a *reasonable suspicion* has been held to exist." *Id.* at 627 [emphasis added]. But in finding that the officers had probable cause to arrest, the court noted one additional fact: "Also articulated and of *crucial impact*: the

Jaramillos both had an unusual bulkiness around their waist." *Id.* [emphasis added]. This bulkiness was indicative of narcotics presently being strapped to their bodies.

In *United States v. Lehmann*, 798 F.2d 692 (4th Cir. 1986), before arresting the defendant, officers saw the "'rounded corners' of a package in Lehmann's crotch area." *Id.* at 694-95. The court found probable cause to arrest based on Lehmann's behavior *plus* observable evidence that "Lehmann was carrying contraband goods in his crotch area." *Id.*

In some instances, Circuits have refused to find probable cause even where there was physical evidence of possible narcotics and other suspicious activity. For example, the Fourth Circuit held in *United States v. Wilson*, 953 F.2d 116, 125 (4th Cir. 1991), that a suspect's refusal to allow officers to search his coat which clearly contained a bulky object even though he had made certain suspicious false statements did not even provide *reasonable suspicion* to detain the man. The Eighth Circuit, in *United States v. Millan*, 912 F.2d 1014 (8th Cir. 1990), found no *reasonable suspicion* to stop, let alone probable cause to arrest, where the defendant fit a drug courier profile *and* had a bulge in his coat pocket.

In *United States v. Mancini*, 802 F.2d 1326 (11th Cir. 1986), the only other case which the District Court and the government cite, the defendant exhibited the same behavioral characteristics as the defendant here, became extremely nervous when approached by the police, and then asked the officers "what happens if I do have drugs?" *Id.* at 1329. The court held that "the circumstances of Mancini's travel, his extreme nervousness during the interview, and *most importantly*, his *implicit admission* that he was carrying a controlled substance, provided the agents with probable cause to believe that Mancini was illegally carrying narcotics." *Id.* at 1330 [emphasis added].

The difference betwen this case and those which the Ninth Circuit, the District Court and the government cite is not just one of minor degree, it is one of extraordinary ramification. For the first time ever, a court has allowed police officers to arrest someone based only on their observed behavior and their response to initial police questioning, without any seizures or observations of actual drugs, without any observable indicia that drugs were actually present, without prior information that suspects were part of a drug-trafficking ring, or without any admission by the defendants that they were carrying drugs. Even where narcotics dogs of proven reliability have alerted positively to the presence of contraband in a suspect's luggage, courts have upheld the temporary seizure of that luggage without authorizing the arrest of a subject who otherwise acted in conformity with some drug-courier profile. *United States v. Attardi*, 796 F.2d 257 (9th Cir. 1986); *United States v. White*, 890 F.2d 1413 (8th Cir. 1989). To allow police officers to arrest someone because he is acting in essence abnormally and does not provide consistent answers to questions which authorities have posed to him is to create conditions which have previously existed only in totalitarian or authoritarian states. Moreover, the Ninth Circuit would broadly expand the category of travelers subject to warrantless arrest.

Although the Ninth Circuit cites *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), for a different proposition—that a reasonable suspicion existed to detain Butler, Toler and Ruffin, (Pet. App. 2a)—the case is actually more relevant to the present one on the issue of probable cause. On facts very similar to the instant case, the *Royer* court found that an arrest was not justified, even though the defendant was traveling from Miami, Florida, a source city of cocaine for New York, his destination, he purchased a one-way ticket in a false name with a *large number of cash bills,* he was

carrying two pieces of notably heavy luggage, and he was nervous and became increasingly so after the police approached him.

Courts have previously commented on the drug courier profile's "chameleon-like way of adopting to any particular set of observations." *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1, 109 S. Ct. 1581, 104 L.Ed. 2d 1 (1989). If the Ninth Circuit's opinion is left to stand, government authorities will be able to use that profile, with little additional evidence, to support not just temporary detention—but to support full-scale arrests of travelers. Virtually any set of circumstances, combined with nervous or evasive answers on the part of a commuter, will justify her arrest. By setting aside the Ninth Circuit opinion, this Court can make a statement to the government authorities in this case—to government authorities everywhere—that Fourth Amendment protections still apply to all travelers in this country.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50425

D.C. No. CR-89-0935-ER-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RODNEY BUTLER,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Submitted February 5, 1992**
Pasadena, California

MEMORANDUM*
[Filed Feb. 18, 1992]

Before: TANG, KOZINSKI and TROTT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The district court concluded that, in light of all the circumstances, Butler did not abandon the bag. This finding was not clearly erroneous. See *United States* v *Mendia*, 731 F2d 1412, 1414 (9th Cir), *cert denied*, 469 US 1035 (1984). Butler therefore has standing to challenge the search.

The district court found, and we agree, that the officers had probable cause to arrest Butler. The clothing, jewelry, beepers and nervous mannerisms of Butler and his companions alerted the officers to the possibility of something amiss, and this suspicion was heightened by the fact that they paid cash for one-way tickets; the officers were justified in approaching Butler and the others and speaking with them. See *Florida* v. *Royer*, 460 US 491, 502 (1983) (plurality). The subjects' reactions to this encounter—intense nervousness, lying, fleeing and the display of a large wad of cash—provided the officers with all they needed to arrest Butler and the others. See *United States* v. *Hoyos*, 892 F2d 1387, 1393 (9th Cir 1989), *cert denied*, 111 S Ct 80 (1990).

A search incident to a lawful arrest is an exception to the warrant requirement. *Chimel* v *California*, 395 US 752, 762-63 (1969). The rationale is to remove the suspect's control weapons or destructible evidence. Id at 763. Here the search took place after the defendant had passed through the airport metal detector and had his bags X-rayed; the justification for a search incident to arrest are thus weak on the facts of this case. Nevertheless, "the [Supreme] Court [has] rejected the suggestion that 'there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.'" *New York* v. *Belton*, 453 US 454, 459 (1981) (quoting *United States* v *Robinson*, 414 US 218, 235 (1973)). A blanket exclusion is necessary so that police can conduct investigations without having to consider every specific situation with which they are

confronted. Id at 458. Because the arrest was lawful, the search of the bag was also; the fact that the search preceded the arrest is irrelevant for Fourth Amendment purposes. *Rawlings* v *Kentucky*, 448 US 98, 111 (1980).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR 89-935-ER

UNITED STATES OF AMERICA
Plaintiff,

vs.

TINA MARIE RUFFIN, REGGIE LA MONT TOLER and RODNEY BUTLER
Defendants.

ORDER DENYING DEFENDANTS RUFFIN AND TOLER MOTIONS TO SUPPRESS

[Filed Mar. 21, 1990]

Ruffin and Butler seek to suppress the evidence of cocaine found in a bag during a stop and search at the Los Angeles International Airport. Both Ruffin and Butler contend that the bag was not abandoned and that there was no probable cause to arrest at the time of the search.

I. Do Ruffin and Butler Have Standing to Contest the Search of the Bag?

The defendants must establish standing to contest any unlawful search. The burden of proof to establish standing, *i.e.* that the defendant had a legitimate expectation of privacy in the object searched, lies upon the defendant. See, *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556 (1980). Ruffin has filed a declaration stating that it was her bag that was searched, and that she closed the bag so that the contents would not be viewed by the public. This satisfies her burden of establishing standing. Butler was observed carrying the bag, and when he was asked

if the bag was his, he initially stated that it was. This establishes standing on his part.

II. Did Ruffin and Butler Abandon the Bag?

A. Standard.

The burden of establishing that the defendant abandoned the item searched lies upon the government. *See United States v. Fernandez*, 772 F.2d 495, 499 (1985). The question of abandonment *"is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts.* Abandonment . . . rests . . . on whether the person so relinquished his interest in the property so that he no longer retained a reasonable expectation of privacy in it at the time of the search." *United States v. Kendall*, 655 F.2d 199, 201 (9th Cir. 1981), *cert. denied*, 455 U.S. 941, 102 S. Ct. 1434 (1982) (*citing United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976)).

Whether a person entertains a reasonable expectation of privacy is to be determined by objective standards. *Kendall*, at 201. Thus the court need not rely upon the statements made by the defendant as to his or her subjective intent.

In *United States v. Nordling*, 804 F.2d 1466 (9th Cir. 1986), the Ninth Circuit stated that the determination as to whether or not a person abandoned property should be made in light of the totality of circumstances, and that two important factors should guide the inquiry: 1) denial of ownership; and 2) physical relinquishment of the property.

B. Did Ruffin Abandon the Bag?

The government claims that Ruffin was present when the officers asked Butler and Toler if the bags were theirs and when the officers stated that the bags were abandoned. The government's theory is that because Ruffin did not assert ownership when Butler and Toler were questioned

and when the agent stated that the bag must be abandoned, she thereby abandoned the bag. From the evidence presented at the hearing, there is an insufficient basis to find that Ruffin abandoned the bag.

She was not asked if the bag was hers, thus there is no evidence of denial of ownership. While Butler and Toler were questioned, Ruffin was off to one side, some distance away and there is no evidence that she knew of the questions. Thus her silence cannot be remotely construed to signify abandonment. The government has not yet met its burden in showing that Ruffin abandoned the bag.

C. Did Butler Abandon the Bag?

Butler was observed carrying the bag as he entered the airport. He also stated that the bag was his when he was first asked. He then was asked *again* if the bag was his, and he denied it. Finally, the agent took the bag and stated that "it must be abandoned." While the denial and subsequent silence satisfies one of the *Nordling* factors for abandonment, there was no physical abandonment or distancing from the item which is one of the characteristics which tends to be present in abandonment cases.

In *Nordling*, the defendant had left his bag on the airplane. As he was deplaning, he was asked if he had any bags left on board and he denied it. He was asked again and he again denied it. The bags then left with the plane and were taken off the plane when it arrived at its destination. Even though Nordling finally claimed ownership of the bag, the panel found that he had effectively abandoned it by leaving it on the plane, and had no standing to contest the search of the bag. *See also United States v. Kendall*, 655 F.2d 199, 202 (1981) *cert. denied*, 455 U.S. 941, 102 S. Ct. 1434 (1982) (where defendant concealed from an officer that he owned a bag which was located at a baggage claim area and the bag was returned to the carousel, the defendant had abandoned the

bag, a co-defendant who carried the claim-check for the bag but made no attempt to collect it, also abandoned the bag); *United States v. Jackson*, 544 F.2d 407, 409 (1976) (no abandonment where defendant dropped his suitcase and walked a few steps away when a DEA agent addressed him; however, when defendant denied ownership of the bags while he was in custody, the denial constituted abandonment).

In the present case, the defendant did not physically abandon the bag. The bag remained in his presence until the government took it and stated that it must be abandoned. Under the totality of circumstances, it does not appear that Butler abandoned the bag. There was no physical relinquishment and the denial of ownership and silence could not reasonably be taken to constitute abandonment of a reasonable expectation of privacy in the bag under the circumstances.

III. When Probable Cause for Arrest exists, a search incident to arrest may be conducted immediately before a valid arrest.

The government is not required to formally arrest *before* a search incident to arrest is carried out. Where there is probable cause to arrest, and the arrest follows quickly upon the search and has an independent basis apart from the search, a search incident to arrest exception exists prior to the formal arrest. *Rawlings v. Kentucky*, 100 S. Ct. 2556, 2564 (1980). *See also, United States v. Salazar*, 805 F.2d 1394 (9th Cir. 1986). In the present case, the government has stated that the arrest followed quickly upon the search.

A. Was there Probable Cause to Arrest at the Time of the Search?

Probable cause is a practical, nontechnical concept. If " 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded

that there was a fair probability' that [the defendant] had committed a crime." *United States v. Morgan*, 799 F.2d 467 (9th Cir. 1986) (*citing United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986).

It is the *totality* of the circumstances at the point of arrest (or in this case, at the point of the search) which determines the probable cause. The fact that some of the acts may be in themselves innocent is immaterial. In addition, "[c]onduct which appears innocent to a lay person may have an entirely different significance to an experienced narcotics officer." *United States v. Hoyos*, 892 F.2d 1387, 1393 (9th Cir. 1989) (citing *United States v. Hicks*, 752 F.2d 379, 384 (9th Cir. 1985)). Also:

> The experience and expertise of the officers involved in the investigation and arrest may be considered in determining probable cause. The arresting officer need not have personal knowledge of the facts sufficient to constitute probable cause. Probable cause may be based on the collective knowledge of all of the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom. *Id.* at 1392 (cites omitted).

In *Hoyos*, the panel found probable cause to arrest for narcotics violations when the police observed the defendant leave the home of a suspected narcotics dealer, drive in a counter-surveillance manner, use a beeper and make "beeper" phone calls. The panel specifically noted that "Narcotics dealers in Los Angeles County use beepers and public telephones in plying their trade." *Hoyos* at 1393. As an additional element of probable cause, the panel noted that Hoyos had attempted to flee when he was confronted by the police.

Factors which are consistent with the drug courier profile alone are insufficient to support probable cause to arrest. *Reid v. Georgia*, 448 U.S. 438, 100 S. Ct. 2752 (1980) (no probable cause to arrest where: 1) defendant arrived from known source city; 2) defendant ar-

rived early in the morning; 3) defendant's companion tried to conceal the fact that they were together; 4) defendant and companion had no luggage beyond carry-on bags); *See also Florida v. Royer*, 103 S. Ct. 1319, 1329 (1983) ("We cannot agree with the State . . . that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.") Thus some factors in addition to the factors which typically appear in a drug courier profile must be present in order to find probable cause to arrest.

In *United States v. Jaramillo*, 891 F.2d 620 (7th Cir. 1989) the defendant was stopped in Chicago's O'Hare airport. The defendants had purchased their tickets in cash, on the same day as their flight, in their own names, from Miami to Chicago with an open return date. When the Jaramillos deplaned in Chicago, they attracted the attention of an experienced narcotics agent. The agent noticed an unusual bulkiness, which protruded from the front, back, and sides of the Jaramillos midsections (where the defendants had strapped packets of cocaine), also the paucity of baggage. As he followed them, he noticed that the Jaramillos looked very nervous and that they backtracked as if to avoid detection. The panel found that these factors supported reasonable suspicion to detain, as well as probable cause to arrest. "The bulkiness of their bodies, the evasiveness of their path, the congruousness of their characteristics with those of the drug courier profile: all the facts pointed to the Jaramillos as surreptitious drug transporters." *Id.* at 627. *See also, United States v. Lehmann*, 798 F.2d 692 (4th Cir. 1986), where an agent noticed that Lehmann had a suspicious bulge with "rounded corners" in the crotch of his pants. The panel found that the suspicious bulge, the defendant's attempt to conceal the bulge by pulling his jacket over it, plus the courier profile, supported a finding of probable cause to arrest. *See also United States v.*

Tomaszewski, 833 F.2d 1532 (11th Cir. 1987) (probable cause to arrest was present when, in addition to typical courier factors, the officer noticed a bulge in Tomaszewski's pants beneath his belt).

In *United States v. Mancini*, 802 F.2d 1326 (11th Cir. 1986) the court found probable cause to arrest on the following factors: the defendant was coming from Miami; he had checked no luggage and his hand baggage appeared empty; he had purchased his ticket in cash, he was traveling under a false name and had only a temporary driver's license; he was acting strangely and very nervously (shaking and hyperventilating); finally, when asked by a DEA agent if he would consent to search, Mancini stated "What happens if I do have drugs?" The panel found that the statement was an "implicit admission" that Mancini was carrying a controlled substance. That, in addition to the other factors constituted probable cause of arrest.

In the present case, according to the declarations of the various agents, the agents knew the following at the time the search was made:

1) the defendants were wearing digital beepers (consistent with narcotics trafficking);

2) they arrived shortly before their flight was to leave;

3) Ruffin paid for the tickets in cash, using aliases on two of the tickets;

4) Ruffin gave inconsistent answers when asked if she knew Butler and Toler, first denying that she was with them, then admitting it;

5) when questioned, defendant Butler gave inconsistent answers, first claiming, then disclaiming ownership of the bags;

6) when asked if she was carrying narcotics or money, Ruffin produced a large sum of cash, over $15,000.00, in two or three wads of bills.[1]

7) the defendants appeared nervous, an officer testified that Ruffin appeared petrified when she was questioned.

The *totality* of these factors provided probable cause to arrest Butler and Toler, as well as Ruffin for either conspiracy to transport narcotics or narcotics transportation. The possession of large amounts of cash, the denial of ownership of the bag, the denial of knowledge of the others, the use of aliases to book the tickets, the presence of beepers, along with the various other elements known to the police, all cumulate to a level at which a reasonable prudent person would conclude with a fair probability that narcotics transportation was occurring. Particularly when considered in light of the officers extensive knowledge of the behavior of narcotics traffickers, there was sufficient probable cause to arrest Butler and the other defendants at the point the search was made. Thus the search was permissible.

B. Conclusion.

The government has failed to meet its burden in establishing that the defendants abandoned the bag. However, the totality of the circumstances at the time of the search were such that there was probable cause to arrest the

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[1] Counsel for Butler challenges the manner in which the cash was produced. Ruffin testified on the stand that the officers reached in and took out the money, while the government states that she produced the money voluntarily (there are minor discrepancies between the testimony of the officers such as to whether she was asked if she was carrying money or drugs). Ruffin's testimony on the stand was not at all credible. She contradicted her own motion to suppress in which she followed the government's account. Additionally her declaration, filed before she testified, makes no mention of the way the money was produced and does not contradict the government account. The Court finds that her testimony on the stand was not credible.

defendants, and Butler in particular, for conspiracy to transport narcotics or narcotics transportation. Because the arrest followed quickly upon the search, there was a valid search incident to arrest. The Motions to Suppress are denied.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order upon the parties to this action.

Dated: March 21, 1990

/s/ Edward Rafeedie
EDWARD RAFEEDIE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 89-935-ER

UNITED STATES OF AMERICA,
Plaintiff,

v.

RODNEY BUTLER,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 16, 1990.

Counsel: With counsel David M. Dudley, retained.

Plea: Guilty, and the court being satisfied that there is a factual basis for the plea.

Defendant has been convicted as charged of the offense of United States Code, 841(a)(1); Conspiracy to Possess with Intent to Distribute a Controlled Substance (Count 1), a Class A Felony.

This court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the Judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be

imprisoned for a term of: one hundred and twenty (120) months. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years under the following terms and conditions: 1) the defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318, 2) the defendant shall participate, as instructed by the Probation Officer, in a program approved by the U.S. Probation Office, for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant has reverted to the use of drugs. Pursuant to Section 5E1.2(f) of the Guidelines, all fines are waived.

Execution of sentence is stayed until August 6, 1990 at 2:00 p.m. at which time the defendant shall surrender to the designated facility of the Bureau or if no designation made, to the U.S. Marshal.

On the motion of government count 1 is dismissed.

In addition to the special conditions of probation imposed above, it is hereby ordered that the Standard Conditions of Supervision set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Dated July 27, 1990

/s/ Edward Rafeedie
EDWARD RAFEEDIE
Judge
United States District Court

[Standard Conditions of Supervision Omitted]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50425

D.C. No. CR-89-0935-ER-3

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RODNEY BUTLER,
Defendant-Appellant.

ORDER

[Filed Jun. 8, 1992]

Before: TANG, KOZINSKI and TROTT, Circuit Judges.

Judges Kozinski and Trott have voted to deny the petition for rehearing, and Judge Tang has voted to grant the petition. The full court has been advised of the suggestion for en banc rehearing and no active judge has requested a vote thereon.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.